

STATE OF MICHIGAN
COURT OF APPEALS

PIERRE EATON, MARGARET HOUSTON, as
Personal Representative of the Estate of RONALD
HOUSTON, and MARGARET TERRISE
HOUSTON,

UNPUBLISHED
October 26, 2006

Plaintiffs-Appellants,

v

BOBBY G'S LOUNGE,

No. 269566
Wayne Circuit Court
LC No. 04-432470-NS

Defendant-Appellee.

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting summary disposition in favor of defendant on plaintiffs' claims for damages arising from a shooting at defendant's lounge. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The decedent Ronald Houston, plaintiff Pierre Eaton, Paris Eaton, Crystal Fowler, and several of their friends went to defendant Bobby G's Lounge to celebrate Houston's birthday. After Houston and Pierre Eaton went to the dance floor, several men from a second group of patrons approached the women in the birthday group. The women refused to speak to the men. One of the men allegedly touched the buttocks of Paris Eaton. When Houston returned to the table, he verbally confronted the men about the touching. A fight ensued. A man fighting with Houston produced a gun, fired several shots, killing Houston and wounding Pierre Eaton, and ran out a side door.

Plaintiffs Pierre Eaton and Margaret Terrise Houston, both individually and as personal representative of the estate of Ronald Houston, sued defendant for (1) negligence per se—dram shop, (2) gross negligence, (3) wrongful death, and (4) survival. Defendant moved for summary disposition, raising the following six arguments: (1) plaintiffs failed to name and retain the allegedly intoxicated person (AIP); (2) there was no illegal service of alcohol; (3) the allegedly illegal service of alcohol was not the proximate cause of plaintiffs' injuries; (4) the ability of the dramshop to use the AIP's defenses of (a) self-defense and (b) mutual affray; (5) plaintiffs' failure to state a claim with respect to negligence; and (6) there is no dramshop liability for criminal acts of a third party.

The trial court granted summary disposition in favor of defendant, reasoning as follows:

As far as the negligence count, the issue is whether defendant owed plaintiffs a duty to protect from what really amounts to third party criminal activity. I think cases are clear on that. They have no obligation other than calling the police in a timely manner, which they did.

The real issue is whether there's a dram shop case. And I don't believe there is. I do not believe plaintiff has met his burden of demonstrating the AIPs were in a state of visible intoxication and that they were served while they were so intoxicated.

The mere fact that an alleged intoxicated tortfeasor drank alcoholic beverages is insufficient to establish he was visibly intoxicated. The motion is granted.

On appeal, plaintiffs argue that they identified a genuine issue of material fact by providing the consistent deposition testimony of Paris Eaton and Crystal Fowler that the shooter was visibly intoxicated and was served alcohol by defendant's employees before he shot Houston. We disagree. We review de novo the grant or denial of a motion for summary disposition. *Abela v General Motors Co*, 257 Mich App 513, 517; 669 NW2d 271 (2003). The dramshop act, MCL 436.1801(2), prohibits a retail licensee from providing alcohol to a visibly intoxicated person. The act also permits a person injured by a visibly intoxicated person to sue a retail establishment that sells alcohol to a visibly intoxicated person, if the sale is a proximate cause of the injury. MCL 436.1801(3); *Reed v Breton*, 475 Mich 531, 537-538; 718 NW2d 770 (2006); *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183-184; 413 NW2d 17 (1987).

Plaintiffs attempted to show that defendant served alcohol to the shooter while he was visibly intoxicated based on the deposition testimony of Paris Eaton and Crystal Fowler. According to Paris Eaton, the man who shot Houston was a Wednesday night regular at Bobby G's Lounge and was always drunk. Eaton claimed that she saw the shooter being served alcohol by a bartender at Bobby G's Lounge before the shooting. Eaton admitted that the shooter was in the bar when she arrived and that she did not know how many or what kind of alcoholic beverages the shooter consumed before she arrived. However, Eaton stated that, after she arrived, "[t]hey were drowning him," because "[e]very five minutes the waitress there, she might have counted them better than I could." Nevertheless, Eaton did not actually specify how many drinks defendant's employees served the shooter and did not describe the shooter's behavior when he was served. Eaton also claimed that the group of men were drinking and ordering drinks while they were at her table and that the shooter had a champagne glass in his hand. Eaton said that she believed the men, presumably including the shooter, were drunk, because the men were drunk "every week" and were "just wild."

According to Crystal Fowler, the men were "under the influence of something. I don't know what it was, but it wasn't just drinks." Fowler said that she could clearly understand the man who shot Houston and that the shooter did not have a beer bottle in his hand, although the other men had beer bottles.

Based on our review of the testimony of Eaton and Fowler, we conclude that it does not establish that the shooter was visibly intoxicated when defendant's employees allegedly served him alcohol. Even accepting the testimony of Eaton and Fowler to establish that the shooter was intoxicated, their testimonies do not provide a sufficient factual basis on which to conclude that defendant's employees served him when he was visibly intoxicated. Without more, the testimony of Eaton and Fowler is insufficient to create a genuine issue of material fact that defendant's employees served the shooter while he was visibly intoxicated.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens